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Supreme Court, U.S.
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No. 05-284 AUG 30 2005

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IN THE

Supreme Court of the United States

Preston W. Small,
Petitioner,

v.

Federal Communications Commission
and United States of America,
Respondents.

On Petition for Writ of Certiorari to the Unites States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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August 30, 2005

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals has jurisdiction to review the entire record before the Federal Communications Commission in upholding the FCC's denial of Mr. Small's application in a 47 U.S.C. § 307(b) comparative licensing proceeding.

2. Whether the court of appeals erred by failing to review the FCC's exclusion of record facts and arguments including the exclusion of the Hartsfield Jackson Atlanta International Airport, owned by the City of Atlanta, but located in College Park, GA, from an analysis of "mutual economic reliance."

3. Whether the court of appeals correctly entered findings of fact and conclusions of law which do not appear in the FCC's orders, or the record, in upholding the agency's decision.

II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner, Preston W. Small, an individual.

2. Respondents, Federal Communications Commission and the United States of America.

3. Intervenor below: WNNX LICO, Inc., a subsidiary of Susquehanna Radio Corporation, which in turn is a subsidiary of Susquehanna Pfaltzgraph Co.

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2. *Report and Order* (*First Staff Order*), 15 FCC Rcd. 9971 (Alloc. Br. 2000), DA 00-322, (65 FR 31498, May 18, 2000), *Erratum*, May 2, 2000.....App. 8a.

3. *Memorandum Opinion and Order* (*Second Staff Order*), 16 FCC Rcd. 3411 (Alloc. Br. 2001), DA 01-333, (66 FR 14862, March 14, 2001).....App. 21a.

4. *Memorandum Opinion and Order* (*First Order on Review*), 16 FCC Rcd. 19857, FCC 01-324, released November 8, 2001 (no *Federal Register* publication).....App. 30a.

5. *Memorandum Opinion and Order* (*Second Order on Review*), 17 FCC Rcd. 14830, FCC 02-201, released July 25, 2002 (67 FR 55729, August 30, 2002).....App. 33a.

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V. OPINIONS AND ORDERS BELOW

1. *Judgment*, United States Court of Appeals for the District of Columbia Circuit, Nos. 04-1056 & 04-1057, May 19, 2005, unpublished, App. 1a; panel rehearing denied, June 8, 2005, App. 4a; rehearing en banc denied, July 26, 2005. App. 6a.

2. *Report and Order* (*First Staff Order*), 15 FCC Rcd. 9971 (Alloc. Br. 2000), DA 00-322, (65 FR 31498, May 18, 2000), *Erratum*, May 2, 2000. App. 8a.

3. *Memorandum Opinion and Order* (*Second Staff Order*), 16 FCC Rcd. 3411 (Alloc. Br. 2001), DA 01-333, (66 FR 14862, March 14, 2001). App. 21a.

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6. *Memorandum Opinion and Order* (*Third Order on Review*), 19 FCC Rcd. 1603 (FCC 2004), FCC 04-1, released January 22, 2004, (69 FR 6582, February 11, 2004). App. 36a.

VI. JURISDICTIONAL STATEMENT

The FCC's jurisdiction to act is found at 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), 303(r), and 307(b). *First Staff Order*, ¶ 13; App. 17a.

Jurisdiction in the court of appeals pertained under 47 U.S.C. § 402(b) because the final rulemaking orders granted WNNX's license modification request and denied Mr. Small's license modification request. *See Judgment*, at 2; App. 2a

(holding is made in No. 04-1056 § 402(b) appeal). Mr. Small also sought review under 47 U.S.C. § 402(a) in No. 04-1057. Appellate jurisdiction also pertains under 5 U.S.C. § 702 which authorizes appellate review of final agency action.

The court of appeals, on its own motion, raised questions concerning the timing of Mr. Small's appeal to that court given Mr. Small's second reconsideration petition filed with the FCC Commissioners. Mr. Small generally responded that multiple reconsideration petitions are routinely filed at the FCC and that the appeals court routinely hears cases from the FCC involving multiple reconsideration petitions. Moreover, Mr. Small cited *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) for the proposition that the appellate filing clock restarts for an entire matter when a subsequent order "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered" amounting to more than textual correction. The *Second Order on Review* contained new substantive material compared to the *First Order on Review* thereby restarting the appellate filing period. The *Judgment* does not discuss this issue and does not fault Mr. Small's manner of exhausting remedies.

The United States Court of Appeals for the District of Columbia Circuit filed its *Judgment* in this case on May 19, 2001. Mr. Small timely filed petitions for rehearing and rehearing en banc, on May 26, 2005, and June 27, 2005, each date being within 45 days of May 19, 2005, as required by D.C. Circuit Rule 35(a), which petitions were denied on June 8, 2005, and July 26, 2005, respectively.

Subject matter jurisdiction arises in this Court under 5 U.S.C. § 702, 28 U.S.C. § 1254(1), and 47 U.S.C. § 402(j). Pursuant to Supreme Court Rules 13.1 and 13.3, and the Court's decision in *Hibbs v. Arizona Department of Revenue*, 124 S. Ct. 2276, 2283-84 (2004), the instant petition is timely because it is being filed within 90 days of the issuance of the July 26, 2005 *en banc* rehearing denial order and, if relevant,